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For Business

news and advice from Birkett Long

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Protection and exploitation of trademarks

In an over-crowded market place the use of trademarks and distinguishing brands is increasingly important in order to differentiate products from competitors.

The registration of a trademark brings exclusive rights to use that trademark to distinguish goods and services from similar offerings. To establish a reputation in a trademark can have a significant commercial advantage to any organisation that sells goods or services to the public or to other businesses. This is particularly true today with rapidly increasing methods of online advertising and sales. Now, more than ever, consumers seek confidence in the brands they purchase, especially in terms of perceived value and quality of products or services.

Once a trademark has been registered, to take full advantage of registration and exclusivity it is essential to ensure that the trademark is exploited and protected to its full extent. As there are significant advantages in protecting brands and goodwill, it is always worth considering the benefit of registering a mark; the registration of the mark will serve as an indicator to competitors that they may not use your mark without your consent and will assist enforcement of the exclusive rights to your mark.

If you have a registered trademark there is legal protection to prevent other parties infringing your mark without your permission. The registration may also assist in any potential trading standards or criminal proceedings against counterfeiters or others using your mark. If your mark is not registered it may still be possible to enforce your rights in what is known as your unregistered trademark, by way of a passing off action. A passing off action is essentially an action to stop a third party passing itself off as your company or related to your company in some way. These two methods of enforcement of your rights are essential considerations when protecting the investment and goodwill that you have established in your mark. At Birkett Long LLP we have extensive experience in registration, exploitation and protection of trademarks and would be happy to assist in relation to the protection and if necessary the enforcement of trademarks and brands.

To discuss registration, exploitation or enforcement of trademarks, or third party infringements, please contact Ian Dawes on 01206 217314 or email ian.dawes@birkettlong.co.uk

Decline in insolvencies

Statistics released by the Insolvency Service for Q2 2012 show a 3.6% decrease on the previous quarter with 4,115 compulsory liquidations and creditors' voluntary liquidations (CVLs). The decrease was entirely in compulsory liquidations with 1,040 in Q2 2012 compared to 1,208 in Q1. The number of CVLs actually increased by 0.4% from 3,062 to 3,075.

There were, additionally, 1,310 (figures not seasonally adjusted) other corporate insolvencies made up of 333 receiverships, 625 administrations and 352 company voluntary arrangements (CVAs). These represented a 6.3% increase on the same period last year, with the greatest increase in CVAs, which were up 88.2%. Receiverships and administrations were down 4.9% and 10.1% respectively compared to the same quarter in 2011. The Insolvency Service noted that the Southern Cross Healthcare Group accounted for 104 CVAs but even discounting these companies the numbers still showed a 41% increase on the Q1 2012 statistics.

These figures are encouraging although accountants PricewaterhouseCoopers reported that retail failures were 426, up from the 386 reported in Q2 2011. Personal insolvencies decreased by 10% to 115,000, the lowest level since 2008.

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Commercial & Corporate Finance

What do you do about a problem like regulation?

We have previously reported on the Red Tape Challenge, launched by the Prime Minister in April 2011, which is about using the experience and ideas of those affected by regulation on a day-to-day basis to help cut the level of red tape. The Challenge aims to look at some of the 21,000 statutory rules and regulations active in the UK today and, in particular, those regulations placing the biggest burden on business and society. If Winston Churchill's statement "If you have ten thousand regulations you destroy all respect for the law" is true, then the Challenge is long overdue, if not welcome.

The Challenge website has been publishing regulations affecting specific sectors and industries on a rolling thematic basis, opening debate on these specific areas for set periods of time (around 4-6 weeks). Business owners and individuals have been encouraged to say which regulations are working and which should be scrapped, saved or simplified. Ministers then have 3 months to work out which regulations should be kept and why – with the default position being that burdensome regulations should go. In addition, the Challenge will be publishing general regulations that cross all sectors – so far the spotlight has been on pensions, company and commercial law, employment related law, environment, health & safety and equalities.

According to the Challenge website, since its launch:

- 19 regulatory themes have been available for comment, totalling more than 3,700 regulations
- Over 28,800 comments and over 950 private submissions have been made
- Ministers have announced decisions on 1,500 regulations across 8 themes so far – of these, well over 50% will be scrapped or improved
- 8 themes have completed the challenge process and begun implementation: retail; hospitality, food & drink; employment related law; manufacturing; road transport; environment; health & safety; and equalities
- 7 more themes will launch on the website by October 2012
- A total of 123 Red Tape Challenge measures were confirmed for implementation by June 2012, including 99 repeals and 24 improvements – a mixture of substantive deregulation and clearing out dead wood
- A new 'Focus on Enforcement' initiative will identify where inappropriate or excessive enforcement of regulation is holding companies back.

From November 2012 the Challenge website will also run a "Disruptive Business Models" theme for comment, allowing anyone to flag up regulatory issues that may be holding back new business models. Entrepreneurs, investors and businesses who run into problems setting up an innovative enterprise that doesn't operate in the way of other established business models can post their experiences. These issues will be considered with the intention that specific regulations will be immediately "put on probation" and scrapped unless the responsible department can justify or satisfactorily modify the regulation in question. Examples of issues reported include Zopa, a company allowing members of the public to lend to each other, which found that financial regulations didn't fit with such a business model; another relates to "disintermediate estate agencies" – a platform where customers sell directly to each other at low or no cost – here estate agency regulations treated them as traditional estate agents and burdens made the model unviable.

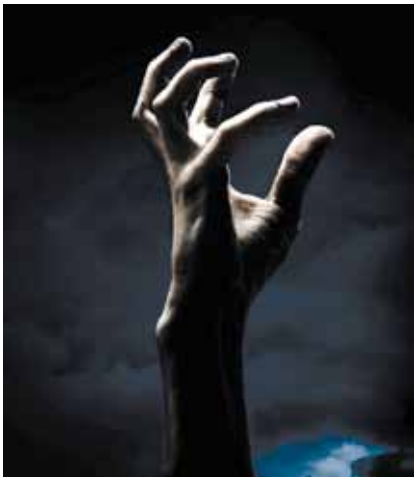
Much regulation is, of course, generated through integration with the EU. The British Chambers of Commerce recently released the results of a poll of close to 2,000 of its members showing that 85% of businesses expressed reluctance on further EU integration, with 47% preferring a looser relationship with the EU. Excessive regulation and unnecessary interference into daily life from EU institutions appears to have contributed to this view.

Following ministerial consideration of the manufacturing sector's theme, the final deregulation package confirms changes to scrap or simplify 65 different rules and regulations affecting the sector – over half of those considered. Of the theme's 128 regulations, 66 were EU or internationally derived and 62 were domestic. This theme has also highlighted the need to modernise the statute books by taking measures such as consolidation of the Gun Barrel Proof Acts from 1868 to modernise the language and reflect changes in the manufacture of firearms over 143 years.

It looks as though real action is being taken to curb the level of existing regulation in the UK. We can but hope there is similar joined up thinking in terms of new regulation to be introduced! To put forward your views on regulation visit www.redtapechallenge.cabinetoffice.gov.uk

For advice on regulatory issues contact Tracey Dickens on 01206 217326 or tracey.dickens@birkettlong.co.uk

Dawn in the red: zombie companies



Insolvency body R3 claims that 8% of UK businesses can only afford to pay the interest on their debt, rather than actually pay down their principal debt, and 30% of companies are regularly reliant on their maximum overdraft facility.

Such businesses are now typically referred to as "zombie companies" – ones which, even though they are insolvent, are being kept alive by creditors and by lending banks varying their terms in order to artificially prolong their existence.

The insolvency rate during the economic downturn has been below the historic norm for recessions and, as noted in the article on page one, fell in the most recent statistics. But, as reported in a recent article published in The Telegraph, global accountancy firm, Ernst & Young, argue that this may be due to a change in attitude among creditors, as banks do not want to be seen as killing off companies trading in difficult conditions by pulling the rug of financial support. But, the accountants argue, this has led to an environment where businesses which should fail, don't fail.

The accountants further argue that consequently these "zombies" are holding back Britain's recovery, making the economy inefficient. The businesses limp on taking up market share and holding on to capital and skills which could be recycled and reinvested by entrepreneurial start-ups or viable competitors that should be growing and boosting the economy. Such "zombies" need either a shot of investment and potentially new management who will look to the future, or a shot in the head and to be wound up.

An increase in interest rates may bring about a cull of "zombie" companies as they find themselves unable to meet increased payments. Even an upturn in the economy may not save such businesses if they find themselves without the resources to deal with increased demand. Capitalism requires an environment where winners and losers either take risks and grow or fail. Propping up companies which should fail takes up resources and stifles innovation that could help us grow and trade our way out of recession.

For insolvency law advice contact Kevin Sullivan on 01206 217376 or kevin.sullivan@birkettlong.co.uk

Tribunal time limits

Employment Tribunal rules state that claims for unfair dismissal must be brought within three months of the effective date of the employee's termination date; for example, if an employee was dismissed on 10 February 2012 the claim must have arrived at the Tribunal on or before midnight on 9 May 2012. If the claim form is not presented within that period the claim will be "out of time" and the Tribunal will not hear it.

However, there are exceptions. Extensions can be given where the Tribunal is satisfied that it was not "reasonably practicable" for the claim to be brought within the three month time limit, although the Tribunal must be satisfied that the claim was brought as soon as reasonably possible thereafter. This means that employees who miss the deadline, but present their claim promptly afterwards, might find that their claim is accepted. The employee will need to persuade the Tribunal that they had good reason for not adhering to the three month limit.

A recent case illustrates the point. An employee was informed by her employer that the time limit was six months. This was considered a reasonable explanation by the Tribunal, which heard her claim late. Another example might be where the employee was too ill to lodge the claim in time. Sometimes further information might be discovered about the dismissal after the three month limitation period has expired, such as where an employee has been made redundant and then finds that someone else was employed to do their job shortly afterwards. Again, the Tribunal might look on this favourably and hear the claim.

However, it is highly unlikely that the time limit would be extended where a "skilled adviser" is at fault. So where a solicitor or a qualified legal practitioner fails to submit the claim on time it will almost certainly be rejected. Where an unskilled adviser is at fault the Tribunal may be more lenient.

Nowadays most claim forms are submitted electronically but it is the responsibility of the claimant or adviser to ensure the forms reach their destination. The Tribunal will not look kindly on technology failures and faxes or emails that arrive late will not be considered a reason to extend the time limit. In one case a claimant submitted a claim form by email at 11.44pm on the last day but he used the wrong email address. He realised his mistake and sent it again with the correct address. The delay was costly! The email was registered as received by the Tribunal one minute and 28 seconds after midnight on the following day and the Employment Appeal Tribunal refused to hear his claim. Similarly, a representative submitted an electronic claim form to the Tribunal at one second to midnight on the final day of the time period but it wasn't received by the Tribunal until eight seconds past midnight. It too was deemed out of time and rejected.

The message here is to ensure that you understand the time limits, send claim forms in good time - preferably several days before the deadline – and confirm receipt.

For information contact Reggie Lloyd on 01206 217347 or email reggie.lloyd@birkettlong.co.uk

Commercial Property

To keep or not to keep? That is the question!

Most commercial leases contain a clause requiring the tenant to return the property to the landlord in good condition, whether on a full repairing basis or subject to a schedule of condition. Although tenants should comply with ongoing requirements regarding repair, decoration and alterations to the property, invariably, any failure to do so does not become an issue until the lease ends.

At that time the landlord or his surveyor will inspect the property and serve on the tenant a schedule of dilapidations setting out any items of disrepair that are covered by repairing covenants in the lease. Most relevant would be covenants as to repair, decoration, and compliance with statutes. Reinstatement requirements relating to alterations differ in that some may require reinstatement, while others may require reinstatement only if the landlord gives notice to that effect.

Some landlords may, therefore, be faced with a difficult decision. Some alterations, such as air-conditioning, may be a valuable addition to the property whereas others, such as fitting out to individual requirements, may prove disadvantageous to re-letting. Tenants sometimes wish to retain fittings for use in premises to which they are relocating, or they may regard them as a bargaining tool to offset any claim by the landlord.

If the lease or licence to alter gives a time limit within which notice to reinstate must be given and the landlord fails to comply, the notice will be invalid. But where no time limit exists, the current position, according to case law, appears to be that the landlord is not required to give notice in good time. This is open to question as it is generally thought that notices of reinstatement should be served with sufficient time for the tenant to comply.

The 2007 code for leasing business premises in England and Wales suggests that landlords should notify tenants of any reinstatement requirements at least six months before the termination date, but this code is not obligatory. To be on the safe side we recommend that landlords serve notices at an early stage.

If a break clause contains a pre-condition to carry out reinstatement works or requires the tenant to comply with covenants in the lease, a failure to reinstate can result in continuation of the lease. It is essential that tenants seek appropriate advice to ensure a successful break.

Leases protected under the Landlord and Tenant Act 1954 allow tenants to give just one day's notice before vacating – insufficient time for a landlord to serve notice to reinstate. Landlords should therefore review requirements before the lease expiry date in case notices need to be served as a protective measure.

Where the tenant has not carried out required reinstatement works and the lease has ended, the landlord will have a claim for the cost of the works, plus a possible claim for loss of rent whilst the works were being done.

Clearly, both parties should seek early advice on alterations and reinstatement provisions so that they can take necessary steps to keep disruption and costs to a minimum.

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